BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT LESLIE	)	
Claimant	)	
	)	
VS.	)	
	)	
UNITED CABLE DIRECT	)	
Respondent	)	Docket No. 1,005,037
	)	
AND	)	
	)	
KS. BLDG. INDUSTRY W.C. FUND	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the May 3, 2004 Award by Special Administrative Law Judge Jeff K. Cooper. The Board heard oral argument on October 19, 2004.

APPEARANCES

Gary K. Jones of Wichita, Kansas, appeared for the claimant. Kendall R. Cunningham of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Special Administrative Law Judge (SALJ) found the claimant suffered a 60.25 percent work disability based on a 64 percent wage loss and a 56.5 percent task loss.

The respondent argues claimant failed to meet his burden of proof that he suffered accidental injury arising out of and in the course of his employment. Respondent contends claimant's testimony regarding his injury is not corroborated by the medical records and not credible. If the claim is compensable, respondent argues claimant abandoned an accommodated job that would have eventually returned him to a wage within 90 percent of his pre-injury average gross weekly wage. Accordingly, respondent argues claimant should be limited to his functional impairment.

Claimant argues that his post-injury average gross weekly wage as a self-employed truck driver should be calculated by deducting his truck's depreciation from his weekly wage which would result in a higher wage loss percentage. Otherwise, claimant argues the SALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The employer is United Cable Direct, Inc., who is a satellite television installation company. Claimant worked for United Cable Direct, Inc., from February 3 to June 3, 2002, as an installer. Claimant performed the physical work required to install the satellite television systems in homes and businesses.

In April 2002, claimant began noticing some back symptoms. Claimant did not believe those back symptoms were anything to worry about until June 3, 2002, when he began experiencing severe pain and numbness in his right leg. The claimant lifted a ladder off his truck and as he carried it toward the house he ducked underneath a tree and noticed more severe back pain as well as numbness in his right leg. As claimant continued working the pain and leg numbness worsened.

Later that afternoon the claimant worked with Richard Colahan, a co-employee, on an installation job. Mr. Colahan recalled claimant complained of increased back pain and that his leg was starting to go numb.

Claimant sought chiropractic treatment and was told that he probably had a herniated disk. The chiropractor referred claimant to a specialist, Dr. Michael P. Estivo, who recommended back surgery. In the meantime, claimant saw a doctor at the West Wichita Minor Emergency Office, who agreed with the chiropractor's opinion that claimant probably had a herniated disk. Claimant had also seen Dr. Robert L. Eyster for a second opinion, who also recommended surgery.

When claimant sought treatment from the chiropractor on June 4, 2002, claimant told the doctor that his back problems started at work approximately three weeks before,

with the pain becoming severe on June 3, 2002. On June 6, 2002, when claimant sought treatment at the West Wichita Minor Emergency Office, he provided a history that his back had been hurting since Monday, which was the 3rd. According to Dr. Estivo's June 24, 2002 office notes, the history that claimant provided was that "[h]e relates that this has been present over the past two months more severe with increasing numbness in his right leg since June 3, 2002 with no specific injuries." And finally, the history given to Dr. Eyster on July 3, 2002, when he first saw claimant was that claimant had been having symptoms for approximately one month.

When considering the entire record, the Board agrees with the SALJ that it is more probably true than not that claimant injured his back while working for respondent and he is entitled to receive workers compensation benefits for that injury. The Board finds claimant's testimony credible that he experienced back symptoms after beginning to work for respondent and that on June 3, 2002, he experienced a significant flare-up in symptoms after removing a ladder from his truck and while carrying it into position to use to climb onto a roof. The Board concludes claimant's accident and back injury arose out of and in the course of employment with respondent.

As previously noted, during the course of claimant's treatment Drs. Estivo and Eyster had recommended surgery. The recommended treatment was based upon diagnostic testing which revealed a herniated disk at L5-S1. Claimant declined the surgery because he testified he was told there was an even chance he would not improve and a second surgery might be required. As a result claimant opted for and received conservative treatment.

At claimant's attorney's request, Dr. Pedro A. Murati examined the claimant on December 9, 2002. Dr. Murati diagnosed claimant with low back pain with radiculopathy secondary to discogenic disease at L5-S1. The doctor imposed restrictions of no crawling, no lift/carry, push/pull greater than 35 pounds and that only occasionally; rarely bend/crouch/stoop; occasional sit, climb stairs, ladders, squat and drive; frequent stand and walk and lift/carry, push/pull to 20 pounds; and alternate sitting standing and walking. Finally, Dr. Murati rated the claimant's whole person impairment at 10 percent based upon lumbosacral DRE category III of the AMA *Guides*[1].

At respondent's attorney's request, Dr. Philip R. Mills examined the claimant on November 6, 2003. Dr. Mills diagnosed claimant with right S1 radiculopathy. The doctor imposed restrictions that claimant should change positions on an as-needed basis and lift only with good body mechanics. Dr. Mills rated the claimant's whole person impairment at 10 percent based upon lumbosacral DRE category III of the AMA *Guides*. Dr. Mills noted it was reasonable for the claimant to decline the recommended back surgery.

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the AMA *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.[2] The Board finds that claimant has met his burden of proof to establish a 10 percent permanent partial whole person functional impairment.

The primary issue raised on review by respondent is whether claimant should be limited to his functional impairment. Respondent argues that if claimant had not quit his job with respondent he would have been trained to perform sales and would have eventually made a wage comparable or greater than his pre-injury average gross weekly wage.

When respondent became aware the treating physician released claimant to return to work it sent claimant a fax requesting that he report back to work on November 7, 2002. The claimant met with Eric Murry, respondent's general manager and president, to discuss claimant's return to work. Mr. Murry testified claimant told him that he did not think he could perform his former job and as a result other work was provided with the expectation that claimant would be moved into a sales position after the first of the year. The sales position would pay $7 an hour plus commission.

The claimant denied he was offered a sales job when he returned to work on November 7, 2002. Notes of the meeting were kept and they contain no mention of an offer of a prospective sales job.[3]

It is undisputed the claimant was placed in a job making cable jumpers, doing some filing and placing phone calls to customers. He was paid $6.50 an hour. Claimant testified that he was never offered a higher paying job. Claimant noted that the atmosphere was strained and his co-employees seemed reluctant to talk to him. Claimant did not feel the job he was given was going to last. Claimant testified:

> Q. Just one, Robert, as far as that being a permanent job at United Cable Direct, you talked before, you said the atmosphere at United Cable Direct was sort of negative I guess or something to that effect?
>
> A. Yes.
>
> Q. Did you think that that was - - that that was going to be a job that was going to last there at United Cable Direct?

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[2] K.S.A. 44-510e(a).

[3] Murry Depo. (Jan. 19, 2004), Ex. 1.

> A. Not actually, no. I just think they were doing that just because they were ordered to bring me back to work, because nobody ever did that, when we went out to work, they made our own jumpers, nobody made jumpers for us, so they were just doing that just to have something for me to do I think.[4]

Claimant quit that job in December and returned to work at a job he had previously held using his truck to go to terminals and pick up recreational vehicles, horse trailers, boats and transport them to dealerships across the country.

If, after a work related accident, the injured employee returns to gainful employment earning less than 90 percent of the average gross weekly wage that the employee was earning at the time injury, the employee is entitled to a work disability (permanent partial general disability in excess of the percentage of functional impairment).[5]

Initially, it must be noted that claimant's pre-injury average gross weekly wage was $754.59 and when he returned to work for respondent on November 7, 2002, he was paid $6.50 an hour which calculates to an average gross weekly wage of $260. Consequently, claimant was making less than 90 percent of his pre-injury average gross weekly wage and was entitled to a work disability at that time.

Claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a). That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

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[4] R.H. Trans. (Jan. 5, 2004) at 39.

[5] K.S.A. 44-510e(a).

But that statute must be read in light of *Foulk*[6] and *Copeland*.[7] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual wages being received when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[8]

The Kansas Court of Appeals in *Watson*[9] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[10]

Respondent argues it was bad faith for claimant to quit because he was going to be trained to perform sales and there was the potential for a comparable wage. Mr. Murry noted that the sales job would have started at $7 an hour plus commissions. Again, a $7 an hour job would not have provided a wage at 90 percent of claimant's pre-injury average gross weekly wage. Although commissions might have significantly raised the average gross weekly wage it would be speculation to state claimant would be that successful. Moreover, claimant denies he was ever offered a sales job and the notes of his November 7, 2002 meeting with Mr. Murry corroborate claimant's recollection of the

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[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8] Id. at 320.

[9] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[10] Id. at Syl. ¶ 4.

discussion. Lastly, it appears that when claimant returned to work he was provided a newly created busy work job that had not previously existed. If respondent had intended for claimant to be a sales person it would seem more consistent that his training would have commenced upon his return to work. Under these facts the Board cannot conclude claimant's actions quitting his job and looking for a higher paying job constituted bad faith.

The next analysis is whether claimant made a good faith effort to find appropriate employment. Claimant returned to a previous job he had held using his truck to deliver trailers to destinations throughout the country. Although claimant contacted a truck transport company to obtain jobs, he noted he was not an employee of that company but instead was considered a self-employed independent contractor. This was a job that Dr. Murati specifically determined exceeded the claimant's restrictions.

Claimant argues that, as testified by an accountant, after deducting depreciation of his truck and other expenses his post-injury average gross weekly wage is $50.64. However, if that wage accurately reflects claimant's post-injury average gross weekly wage, it could not be said that claimant obtained appropriate employment because the job he quit paid an average gross weekly wage of $260. A claimant in a workers compensation case, unable to perform his or her previous employment because of the injury, is entitled to seek new employment which is in his or her best interest, the same as any other person might, and without regard to its effect on the calculation of work disability. What the claimant should not be able to do is seek low wage employment for the purpose of enhancing the workers compensation benefits. If he/she were to do so, that would not be "appropriate" employment.

There was additional testimony by the accountant, using another accounting method of gross income less expenses, that claimant's post-injury wage was $270.20. And there was testimony from Dan Zumalt, respondent's vocational expert, that claimant retained the capacity to earn approximately $366.80 a week doing light bench type assembly work. In this case the Board finds claimant did not make a good faith effort to obtain "appropriate" employment. The employment did not produce the type of income he might expect and perhaps can obtain. The Board concludes that the appropriate post-injury wage, after considering all the evidence including the expert testimony regarding claimant's capacity to earn wages, would be in the range of $260 to $366.80. Accordingly, the Board imputes an average gross weekly post-injury wage of $313.40. This figure results in a 58 percent wage loss.

The Board adopts the SALJ's finding of a 56.5 percent task loss. The work disability is determined by averaging the task loss with the wage loss.[11] Consequently, the claimant has suffered a 57 percent work disability.

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[11] K.S.A. 44-510e(a).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jeff K. Cooper dated May 3, 2004, is modified to reflect claimant suffered a 57 percent work disability and affirmed in all other respects.

The claimant is entitled to 20.43 weeks of temporary total disability compensation at the rate of $417 per week or $8,519.31 followed by permanent partial disability compensation at the rate of $417 per week not to exceed $100,000 for a 57 percent work disability.

As of November 22, 2004, there would be due and owing to the claimant 20.43 weeks of temporary total disability compensation at the rate of $417 per week in the sum of $8,519.31 plus 113.57 weeks of permanent partial disability compensation at the rate of $417 per week in the sum of $47,358.69 for a total due and owing of $55,878, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $44,122 shall be paid at the rate of $417 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of November 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gary K. Jones, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
Jeff K. Cooper, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director